The plaintiff therefore in the opinion of the Court, succeeds in this claim completely.

Judgment for plaintiff for $3,118.78 interest at 8% from date of judgment till realization and costs.

Judgment accordingly.

[APPELLATE CIVIL JURISDICTION]

MUDIE, J.

October 7, 1933.

THE RECEIVER AND MANAGER OF PERAK TIN LIMITED .. .. Defendant (Appellant)

vs.

JOHN CHARLES BAUMANN .. Plaintiff (Respondent)

[PERAK WARDEN'S CIVIL APPEAL No. 34 of 1933]

[APPEAL FROM THE DECISION OF THE WARDEN OF MINES, PERAK]

Cancellation of sublease for breach of condition regarding payment of tribute—Mining Enactment 1911 and Mining Enactment 1928 Section 27(ii)(a)—Discretion of Warden to relieve against forfeiture—Applicability of Equitable principles—Rights of parties to a sublease made prior to passing of Mining Enactment 1928 determined by date of accrual—Lessor's right to cancellation acquired at the date of breach—Interpretation and General Clauses Enactment 1932 Section 15.

In 1924 the Respondents who held certain Mining Lands as sublessees granted a sublease to Perak Tin Limited a Company of which the Appellant was appointed Receiver and Manager in 1931.

Both the sublease granted to the Respondent and the sublease granted by the Respondent to the Appellant contained clauses providing for the payment of tribute at rates varying inversely with the number of labourers employed or the equivalent horse power applied in working the mine, with the usual penalty clause. In each case a further clause provided for cancellation by the Warden or the Court upon proof *inter alia* of failure to pay tribute for a period of one month from the date at which payment became due.

The Company granted a further sublease of the Mining Land in 1930 to Lai Weng Huin.

In November 1932 the latter without the knowledge of the Appellant made a reduction in the horse power applied to the working of the mine by substituting for that month an 120 horse power engine for the 200 horse power engine previously used.

Tribute accordingly became payable by the Appellant at the rate of 8% instead of 6% as before.

On 17th January 1933 again without the knowledge of the Appellants the engine then in use was removed from the mine. Tribute accordingly again became payable at 8% from that date.

On the 15th June 1933 the Respondent learning of the removal of the engine in January wrote to the Appellant drawing attention to the change in circumstances and rate of tribute payable as from 17th January and calling for a sum of $117.40 as being payable for enhanced tribute, and also calling for anything further due by way of tribute.

The Respondent also called for a census of labour and machinery employed on the mine during 1932.

The Appellant on being informed of the removal of the engine in January 1933 forwarded a cheque for $117.40 on 17th June 1933.

On 29th June 1933 the Respondent returned the cheque and announced his intention to take proceedings for cancellation of the sublease, unless the Appellant was willing to surrender it.

On 30th June the Appellant replied refusing to surrender the sublease. He forwarded the census of machinery and labour, which he had by then received from his sublessee, and reported the discovery of the reduction by Lai Weng Huin in the horse power applied in November 1932, and on the next day forwarded a cheque for $30.10 as additional tribute due for the month of November 1932.

The Respondent refused this payment in amends and applied for, and obtained, an order from the Warden of Mines Perak for the cancellation of the sublease granted by him to the Appellant.

The latter appealed against this order.

Held, the rights of the parties in regard to forfeiture for a breach of condition to pay tribute arose when the breach occurred. The law applicable was the law in force when the breach occurred, and accordingly the matter was governed by the Mining Enactment of 1928.

Held further, under this last Enactment the Warden of Mines possesses a judicial discretion in the exercise of which in cases of non-payment of tribute he should be guided by English equitable principles in regard to relief against forfeiture for non-payment of rent.

Held further, even if by reason of the Appellant's breaches the Respondent were found liable for a penalty to his sublessor, there was no evidence to show that he might experience difficulty in recovering any such penalty from the Appellant.

J. M. M. Lewis for the Appellant. Failure to pay tribute at the rate prescribed is admitted, but the Appellant was ignorant of change in methods of working employed by his sublessees and unaware that tribute had become due at an enhanced rate, until he received in June notification to that effect from the Respondent. The Respondent called for the additional tribute from January 17th. For this the Appellant sent a cheque promptly. The Respondent also called upon the Appellant to adjust without delay any further sums should they be due on account of tribute. The Respondent has waived his right to cancellation if any, and affirmed the relationship of landlord and tenant by deliberate election.

Clause providing for cancellation on default continuing for one month is invalid whether the matter falls under the 1911 or the 1923 Mining Enactment.

Period fixed by law is 6 months. No power to cancel was conferred by the 1911 Enactment on the Warden.

Warden acted under Section 97(2) of the Mining Enactment 1928 and possesses a discretion.

Yap Foong v. *Salak South Ltd.*, does not apply, Innes on Registration of Title 145.

In exercising discretion the Warden should have regard to English equitable principles. *Lai Yew Seng* vs. *Wong Chin Gook*, 2 F.M.S. Law Reports 112.

Equity gives relief against forfeiture for non-payment of rent whenever breach can be cured by payment. *Bowser* v. *Colby*, 66 E.R. 969, *Howard* v. *Fanshowe*, (1895) 2 Ch. 581 and other English and Indian cases.

The Hon'ble Mr. E. D. Shearn for the Respondent. It is for the Appellant to show that the Warden was wrong. There was a breach of condition which empowered the Warden to cancel the sublease. The sublease was made in a form appropriate to the Mining Enactment 1911. It contained a contract providing for cancellation at the request of the sublessor on proof of a breach. *Yap Foong* v. *Salak South Ltd.*, Innes on Registration of Title 145, applies. The Warden had jurisdiction to cancel under Section 97(ii) (a). In exercising it he must have regard to the contractual right of the parties.

The sublessor's contractual right to cancellation is preserved by the Interpretation and General Clauses Enactment 1932 Section 15(ii) (iv) and by the earlier Enactment of 1924, also by the Mining Enactment of 1928 Section 2(ii). Sublessor is himself liable to penalties at the hands of his lessors, under the terms of his lease for breach of condition.

English authorities are not applicable here to leases under the Land Code 1926 or the Mining Enactment. Right to forfeiture is statutory and no statutory relief is provided. In any event in England relief is only given if payment is made of arrears and the lessor's position is not prejudiced by the breach. In this case the lessor is liable to statutory penalties by reason of the breaches. There has been no waiver. Respondent had no knowledge of the breach in November, when he did the act relied upon by the Appellant as a waiver. Waiver depends on the recognition after the breach of the relation of landlord and tenant. Where registration of title is in force this recognition must persist in any event until cancellation and the doctrine of waiver is not applicable.

J. M. M. Lewis in reply. I abandon waiver.

There is no evidence of any intention of Respondent's lessor to enforce any penalty against the Respondent, and no evidence that if the Respondent incurred such penalty he would experience difficulty in recovering it from the Appellant.

MUDIE, J.—This is an appeal from the judgment of the Warden of Mines granting an application by the plaintiff for cancellation of a sublease of certain mining land subleased by him to the defendant company.

Clause 1 of the sublease provides for the payment of tribute at 8% if a labour force of less than 500 coolies is employed, and at 6% if 500 or more coolies are employed.

The plaintiff's claim is for cancellation of the sublease under Section 97(ii) (a) of the Mining Enactment, 1928, on the ground that tribute for a certain period, when less than 500 coolies were employed, was paid at 6% instead of 8%, in breach of clause 1.

Section 97(ii) (a) reads as follows:—

> (ii) "The Warden shall have power in his discretion to cancel a sublease upon proof to his satisfaction that—
> (*a*) "the sub-lessee has failed for a period of six months from the date at which payment became due to pay to the sub-lessor the amount of any moneys which he is by the terms of his sublease bound to pay;"

The Warden held that a breach of clause 1 of the sub-lease had been proved, and that the sub-lease was liable to cancellation under section 97(ii) (a).

He was asked to exercise his discretion in favour of the defendant on the ground that as soon as the defendant became aware of the alteration in the labour force which had been made by the defendant's sublessee, without the knowledge of the defendant, he immediately sent the plaintiff a cheque for the full amount of the arrears, and that the plaintiff had suffered no damage.

The Warden held that he had no discretion in the matter, and that on proof of the facts mentioned in Section 97(ii) (a), the plaintiff was entitled as of right to an order for cancellation.

The material passage in his judgment reads as follows:—

> "The question of the Warden's discretion referred to in section 97 (ii) (a) does not, in my opinion, come into the matter. The only person who can overlook a definite breach, however trivial, due to an oversight, is the sublessor, not the Warden. I read the Enactment to mean that when circumstances arise, such, for instance, as the introduction of legislation to restrict the output of tin ore, over which a sublessee has no control, that it is proper for the Warden to refuse cancellation when such circumstances have been, in his opinion, the cause of failure to comply with the conditions of the sublease. Such circumstances do not arise in this case."

The defendant now appeals to this Court on the ground that the Warden was wrong in holding that he had no discretion in the matter, and that his discretion ought to have been exercised in his favour.

He contends that the principles of equity as to relief against forfeiture for breach of a covenant to pay rent apply, that the arrears of tribute were tendered in full, and that equity will relieve against the forfeiture.

It is argued for the respondent that as the sublease was made in 1924, before the Mining Enactment of 1928 was passed, we have to consider the rights of the respondent under the Mining Enactment of 1911. There is no section in that enactment corresponding to Section 97 (ii), conferring a discretion on the Warden. The

Warden therefore, had no discretion in 1924. The case of *Yap Foong* v. *Salak South Ltd.*, Innes' Registration of Title 145, was cited, in support of this contention. The argument is that his absolute right to cancellation, unfettered by any discretion in the Warden, is preserved after the passing of the 1928 Enactment by Section 15 (ii) of the Interpretation and General Clauses Enactment 1932, which reads as follows:—

> 15. "Whenever any written law repeals wholly or in part a former written law, such repeal shall not, in the absence of any express provision to the contrary, affect or be deemed to have affected.
>
> (ii) "any right, liberty, privilege, obligation or liability acquired, imposed or incurred under the repealed written law;"

It is said that he acquired a right under his contract to absolute cancellation in certain circumstances and that that right is preserved.

If that contention is correct, the Warden has no discretion in applications for the cancellation of subleases which were made under the 1911 and earlier enactments.

In my opinion that argument applies only to cases in which the breach occurred and rights were acquired under the older enactments. In the present case the breach did not occur, and no rights, therefore, were acquired in respect of it till after the coming into operation of the 1928 Enactment.

The rights of the respondent must therefore be determined under the 1928 Enactment, which expressly confers a discretion on the Warden.

It was further argued on behalf of the respondent that the English authorities on relief against forfciture, cited by the appellant, have no application, on the ground that the plaintiff's right to cancellation is statutory and there is no statutory right to relief.

No authorities were cited in support of this proposition, and in my opinion it is not good law. There is an *obiter dictum* by Edmonds, J. C., in *Lai Yew Seng* v. *Wong Chin Gook*, 2 F.M.S. Law Reports 112, that in the case of a lease under the Land Code the Court will relieve against forfeiture on the tenant tendering or paying into Court the rent and costs. That is a statement of the law with which I respectfully agree.

It is finally argued for the respondent, that even if equitable principles are applicable, it would not be equitable to relieve in this case, because the appellant's breach has made the respondent liable to penalties under clause 3 of the sublease, and that if he were held liable he might have difficulty in recovering from the appellant in view of the financial position of the Company.

This argument is not based on any evidence, and seems to me to be entirely imaginary. I am satisfied that the relief asked for will in no way prejudice the respondent.

In my opinion a discretion is conferred on the Warden by Section 97(ii) of the 1928 Enactment. It is a discretion which must be exercised judicially, that is to say, having regard to the principles of law and equity.

As the appellant had tendered the arrears of tribute in full, the Warden ought to have exercised his discretion in his favour, on condition that he paid the costs of the application.

The appeal will be allowed.

The decision of the Warden will be reversed.

There will be an order that the plaintiff's application be dismissed.

The costs of the proceedings in the Warden's Court will be paid by the appellant.

The costs of the appeal will be paid by the respondent.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

October 11, 1933.

BANSI RAM.....Plaintiff.

vs.

1. NIHAL SINGH

2. INDER SINGH

[IPOH CIVIL SUIT No. 1102 of 1933]

[REVIEW OF RULING OF 2nd MAGISTRATE IPOH AS TO COSTS]

Costs in Magistrates' Courts—Rules under Courts Enactment—Advocacy fee.

The fee for advocacy under the Scale of Costs in the Courts of Magistrates laid down under the rules published in Gazette Notification 8430 of November 18th 1932 is chargeable whether the claim is contested or judgment is given by confession, or consent, or default of appearance.

At the hearing the plaintiff was represented by advocate. Judgment was given without argument by admission in the case of one defendant and by default in the case of the other.

The Magistrate disallowed the fee for advocacy and under Rule 2(x) submitted the record to the Supreme Court.

MUDIE, J.—The fee for advocacy includes getting up the case. Counsel had to come prepared to argue the case, though, as it happened, no argument was necessary.

The advocacy fee is properly chargeable not only where the claim is contested, but in cases where judgment is obtained by confession or consent or by default of appearance at the trial.

There will be an order that the fee for advocacy be allowed.

Order accordingly.